No. 89-272



In The

# Supreme Court of the United States

October Term, 1989

SEYMOUR LITTMAN, Individually
and as Mayor of the Township
of Millstone, DIANAMIC INDUSTRIES,
THE TOWNSHIP OF MILLSTONE,
a Municipal Corporation of the
State of New Jersey, and
COBBLESTONE-PENN LIMITED PARTNERSHIP,

*Petitioners,*

v.

RICHARD GIMELLO, Executive Director,
and THE HAZARDOUS WASTE
FACILITIES SITING COMMISSION,

*Respondents.*

## RESPONDENTS' BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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## QUESTIONS PRESENTED

1. Whether the declaration of certain real property by the New Jersey Hazardous Waste Facilities Siting Commission as a potential site for a hazardous waste incinerator constitutes a taking of property without just compensation in violation of the United States Constitution?

2. Whether the Major Hazardous Waste Facilities Siting Act, which provides for the exercise of the power of eminent domain following the completion of a multi-tier administrative siting process, is violative of the United States Constitution?

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below are accurately set forth by petitioners. Respondents note, however, that the consolidation of cases mentioned by petitioners was made by the trial court. The potential site located in the Township of East Greenwich, New Jersey, was eliminated from further consideration by respondent Commission before the petition for certification was sought before the New Jersey Supreme Court. Therefore, none of the plaintiffs in the East Greenwich proceeding participated in any way in the matter before the New Jersey Supreme Court.

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## COUNTER-STATEMENT OF THE CASE

The New Jersey Legislature enacted the Major Hazardous Waste Facilities Siting Act ("Act"), *N.J.S.A.* 13:1E-49 *et seq.*, in 1981. As the court below noted, the Act created respondent Hazardous Waste Facilities Siting Commission ("Commission") and charged it "with the responsibility of locating appropriate sites for the future construction of hazardous waste facilities needed by the State of New Jersey. *N.J.S.A.* 13:1E-59." *Littman v. Gimello*, 115 *N.J.* 154, 157, 557 *A.*2d 314, 316 (1989) (Petitioners' Appendix A, page 3a).

In February 1986, the Commission identified 11 potential sites it preliminarily believed to be environmentally suitable for facility location. Seven of the sites were potential sites for a hazardous waste incinerator. The remaining four were potential sites for an above-ground emplacement facility. *Littman v. Gimello, supra*, 115 *N.J.* at 158, 557 *A.*2d at 316 (Petitioners' Appendix A, page 4a).

The identification of the 11 potential facility sites was an extremely preliminary step by the Commission. It was, in fact, not required by the Act and was thus preliminary even to the beginning of the multi-step review process established by the Act. *N.J.S.A.* 13:1E-59(a)(1) through (5). The identification was made simply because the Commission needed to enter upon the potential sites for testing to confirm or refute hydrogeological assumptions made about each site relative to mandatory siting criteria. *See N.J.S.A.* 13:1E-57 and *N.J.A.C.* 7:26-13.1 *et seq.* The Commission felt that a frank public announcement of even such a preliminary step was the most appropriate course to follow.

If the testing revealed that a site failed to conform to the criteria, the site would be eliminated from further consideration as a hazardous waste facility site. If a site was found to conform to the criteria, the Commission would then decide whether or not to propose that site for designation as a facility site. *N.J.S.A.* 13:1E-59(a)(1).

In fact, the "proposal for designation" is only the beginning of the multi-step administrative review process mandated by the Act. *Id.* At least four additional steps must occur before the Commission is considered to have taken "final agency action" (subject to judicial review) concerning the site. The steps are: (1) the awarding of a grant from the Commission to the affected municipality for the conducting of a site suitability study by consultants acting on behalf of the municipality; (2) the municipal site suitability study itself; (3) a plenary adjudicatory hearing before the New Jersey Office of Administrative Law, in which the administrative law judge (ALJ) cannot favorably recommend the site for location of the hazardous waste facility unless the ALJ finds that the facility will not constitute a substantial detriment to the public health, safety and welfare of the affected municipality; and (4) a vote by the Commission whether to affirm, conditionally affirm or reject the ALJ's findings. For that vote, the Commission will be expanded by two additional voting members. One will be appointed by the governing body of the affected municipality and the other will be appointed by the governing body of the county in which the facility is located. *N.J.S.A.* 13:1E-59(a)(1) through (5) and *N.J.S.A.* 13:1E-52(c).

The Commission's decision is appealable as of right to the Appellate Division of New Jersey Superior Court.

*N.J.S.A.* 13:1E-59(a)(5); *N.J. Rules of Court* 2:2-3(a)(2) (Pressler ed. 1989). Once the administrative review process is completed, an engineering design for the facility has been approved and negotiations for the purchase of the site have proven unsuccessful, the Commission is authorized to exercise powers of eminent domain to acquire the adopted site. *N.J.S.A.* 13:1E-81.

Among the seven potential incinerator sites identified by the Commission in February 1986 was real property located within petitioner Township of Millstone ("the Millstone potential site"). Petitioner Dianamic Industries ("Dianamic") owns a portion of the Millstone potential site. Petitioner Cobblestone-Penn owns property adjacent thereto. If the Millstone potential site were adopted by the Commission – an event that has not yet occurred and may never occur – a portion of petitioner Cobblestone-Penn's property may have to be condemned as part of a "buffer zone" required for the facility. *N.J.S.A.* 13:1E-57.

Prior to identification of the Millstone potential site, Cobblestone-Penn had plans to develop a senior citizens mobile home park on its property. Absolutely nothing in the Commission's action in identifying the potential site in Millstone has ever posed a legal impediment to such a development. Nothing in the Act or its regulations has placed any type of restriction, moratorium, "freeze" or other prohibition whatsoever against the development of the potential site. As the court below noted, "The identification of the eleven potential sites and the attendant publicity did not prevent the landowners from using or developing their property. Nothing in the Act or regulations thereto poses a legal impediment to the use or

development of [petitioners'] land." *Littman v. Gimello, supra*, 115 *N.J.* at 162, 557 *A.*2d at 318 (Petitioners' Appendix A, page 9a).

Nevertheless, as the court below noted, petitioners brought suit alleging "that the Act constituted a 'taking' of property without just compensation and due process in violation of the United States and New Jersey Constitutions." *Id.* at 158, 557 *A.*2d at 316 (Petitioners' Appendix A, pages 4a to 5a). The trial court dismissed the complaint (Petitioners' Supplemental Appendix, page 28a). The dismissal was affirmed by the Appellate Division of New Jersey Superior Court substantially for the reasons stated in the trial court's opinion (Petitioners' Supplemental Appendix, page 2a).

The New Jersey Supreme Court granted petitioners' petition for certification. *Littman v. Gimello*, 111 *N.J.* 639, 546 *A.*2d 550 (1988). In November 1988, pending oral argument before that court, respondent Commission proposed the Millstone site for designation, the first step in the administrative review process mandated by the Act. *Littman v. Gimello, supra*, 115 *N.J.* at 168, 557 *A.*2d at 321. (Petitioners' Appendix A, page 15a).*

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* The ten other potential sites identified by the Commission in 1986 were eliminated between 1986 and 1988. Testing continues at the Millstone potential site; the Commission could eliminate that site at any time throughout the entire multi-step review process if test results warrant such action. *See N.J.S.A.* 13:1E-59(c). Further, the Commission can eliminate the site in

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The New Jersey Supreme Court affirmed the Appellate Division's decision. *Littman v. Gimello, supra,* 115 *N.J.* at 169, 557 *A.*2d at 321 (Petitioner's Appendix A, page 16a). The decision of the court below was rendered on May 4, 1989. On August 3, 1989, petitioners filed their petition for a writ of *certiorari.* Respondents submit that the writ should be denied.

## REASONS FOR DENYING THE WRIT

**The Petition For A Writ of Certiorari Should Be Denied Since The New Jersey Supreme Court Correctly Decided That The Mere Designation Of A Potential Site For A Hazardous Waste Incinerator Did Not "Take" The Property Without Just Compensation Under The United States Constitution.**

The Court generally will issue a writ of certiorari "only when there are special and important reasons therefor." Rule 17.1. Among the reasons that may cause the Court to issue a writ are "[w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals" and "[w]hen a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in any way in

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favor of a site proposed by a hazardous waste industry. *See N.J.S.A.* 13:1E-59(b) and (c). In fact, at this time the Commission is reviewing an application by GAF Chemical Corporation to site the incinerator on GAF's industrial tract in Linden, New Jersey (Respondents' Appendix, page 1a).

conflict with applicable decisions of this Court." Rule 17.1(b) and (c).

Respondents submit that the petition in this case demonstrates none of those reasons. The decision of the court below was fully in accord with this Court's rulings on the "taking" issue. The only case petitioners cite as presenting a conflict, *First English Evan. Luth. Ch. v. Los Angeles Cty.*, 482 *U.S.* 304, 107 *S.Ct.* 2378, 96 *L.Ed.*2d 250 (1987), is readily distinguishable. Further, as even petitioners assert, this case presents "specific facts." (Petition, page 8). The decision would affect few, if any, individuals beyond the litigants to this case.*

Petitioners have summarized their argument as follows:

> The essence of petitioners' complaint is that the actions of respondents have effectively deprived petitioners of any beneficial use of their property and they are entitled to compensation now because of that deprivation; moreover, the Major Hazardous Waste Facilities Siting Act is unconstitutional because it precludes such compensation now and does not guarantee property owners full and adequate compensation later. [Petition, pages 5 to 6].

The reasons why the writ should be denied concerning each of those points will be addressed *seriatim*.

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* The only other potential site currently under consideration by the Commission is the GAF site in Linden, New Jersey. See note, page 4 *supra*. Since GAF has applied to build the facility, little if any land would have to be condemned if the Commission chose the Linden potential site instead of the Millstone potential site.

### A. The Actions Of Respondents Have Not Effectively Deprived Petitioners Of Beneficial Use Of Their Property. Petitioners Have No Right To Receive Compensation.

The actions of the Commission to date concerning the property in question have been nothing more than the preliminary steps of identifying it as a potential hazardous waste facility site, proposing the site for designation and issuing a grant to Millstone Township for performance of a municipal site suitability study as required by the Act. *N.J.S.A.* 13:1E-59.* Other administrative review steps, such as a plenary hearing before the New Jersey Office of Administrative Law – in which the Commission has the burden of proof by a "clear and convincing" standard – are also required by the Act even before judicial review occurs. *Id.*

The Millstone potential site could be eliminated from further consideration at any time throughout the multi-step administrative review process which has now barely begun. *See* Counter-Statement of Facts, page 2, *supra*. At no point until the Commission actually exercises eminent domain powers, which it cannot do until after adoption of the site following the administrative law hearing

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* Only the identification of the site as a potential facility site had occurred when petitioners brought suit in 1986. The proposal for designation occurred in November 1988, while the case was pending before the New Jersey Supreme Court. *Littman v. Gimello, supra*, 115 *N.J.* at 168, 557 *A.*2d at 321. (Petitioners' Appendix A, page 15a). Issuance of the grant occurred in August 1989, about three months after the court below rendered its decision.

(which hearing and adoption have not yet occurred and may never occur), does the Commission have any authority whatsoever to impose any restrictions, moratoriums, "freezes," or other prohibitions of any kind against development of a potential site. As the court below stated, "Nothing in the Act or regulations thereto poses a legal impediment to the use or development of [petitioners'] land." *Littman v. Gimello, supra,* 115 *N.J.* at 162, 557 *A.*2d at 318 (Petitioners' Appendix A, page 9a).

The decision of the court below that no "taking" has occurred is therefore fully in accord with decisions of this Court. Where no law infringes upon the landowner's freedom to make whatever use it pleases of its property, no taking has occurred. *Kirby Forest Industries, Inc. v. United States,* 467 *U.S.* 1, 15, 104 *S.Ct.* 2187, 2196, 81 *L.Ed.*2d 1, 13 (1984). In *Kirby Forest,* "petitioner [was] unable to point to any statutory provision that would have authorized the Government to restrict petitioner's usage of the property prior to payment of the award." *Ibid.* (Footnote omitted). The same is true in this case. *Compare, First English Evan. Luth. Ch. v. Los Angeles Cty., supra,* 482 *U.S.* at 307, 107 *S.Ct.* at 2381-2382, 96 *L.Ed.*2d at 259, in which an interim ordinance indeed prohibited construction within a flood protection area.

Petitioners contend, however, that even absent legal restrictions upon development, the Commission's consideration of the potential site effects a taking because it hangs "like a poisoned yellow cloud" over such development. (Petition, page 10). The court below accepted as true the allegations that the Commission's actions had adverse effects on salability and financing. *Littman v. Gimello, supra,* 115 *N.J.* at 162-163, 557 *A.*2d at 318-319

(Petitioners' Appendix A, pages 8a to 10a). The court below correctly found nonetheless that no taking had occurred thereby because, as it stated, "[t]he cases are legion that hold that decreases in the value of property during governmental deliberations, absent extraordinary delay, are incidents of ownership and do not constitute a taking." *Id.* at 163, 557 *A.*2d at 319 (Petitioners' Appendix A, page 10a). The court below then quoted this Court's decision in *Kirby Forest, supra*:

> (I)n the absence of an interference with an owner's legal rights to dispose of his land even a substantial reduction in the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment. Kirby Forest Indus. v. United States [*supra*], 467 U.S. [at] 15, 104 S.Ct. [at] 2197, 81 L.Ed.2d [at] 14. [*Littman v. Gimello, supra*, 115 *N.J.* at 163, 557 *A.*2d at 319 (citations omitted). (Petitioners' Appendix A, page 10a)].

Petitioners argue that the procedures of the Act effect a taking because the landowner "faces almost total loss of property rights" for an indefinite period which petitioners claim could last up to 92 months from the identification made in February 1986. (Petition, page 14). Respondents submit that petitioners' argument cannot support the issuance of the writ.

First, the decision of the court below that the landowner petitioners have not lost the beneficial use of their property was fully consistent with decisions of this Court. The legal premise of petitioners' argument is thus invalid. Of perhaps even greater significance is the fact that petitioners' claim of a present taking is based entirely upon gross conjecture as to the future. Petitioners

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> condemnation. As the trial court correctly held, however, the question is whether the Commission's actions to date constitute a taking. The procedures under the Act on their face are not unreasonable. We decline to speculate about whether in practice their implementation will result in delays that are so excessive as to constitute a taking. [*Id.* at 168, 557 *A.*2d at 321 (Petitioners' Appendix A, pages 15a to 16a)].

The court below stated that "[i]t is unwise and unnecessary to deal with such speculative and hypothetical questions." *Id.* (Petitioners' Appendix A, page 16a). This Court has long held that it will not attempt to forecast issues or decide them hypothetically. *See Morgan v. United States*, 304 *U.S.* 1, 26, 58 *S.Ct.* 999, 1001, 82 *L.Ed.* 1129, 1136 (1938); *Smiley v. Holm*, 285 *U.S.* 355, 375, 52 *S.Ct.* 397, 402, 76 *L.Ed.* 795, 804-805 (1932). *See also Abbott Laboratories v. Gardner*, 387 *U.S.* 136, 148, 87 *S.Ct.* 1507, 1515, 18 *L.Ed.*2d 681, 691 (1967) (courts should avoid "premature adjudication" by avoiding "abstract disagreements"). The court below committed no error in holding likewise.

Since the decision of the court below was fully in accord with the rulings of this Court and since there is no conflict between various state or federal courts on the issue, the petition for *certiorari* should be denied.

### B. The Major Hazardous Waste Facilities Siting Act Guarantees Full And Adequate Compensation To Property Owners For All "Takings" Of Their Property.

Petitioners' second major contention is that the Act violates the United States Constitution in that it gives the owner of a potential site "neither the ability to use his

property nor certainty as to the parameters of his temporary or permanent loss nor temporary compensation nor permanent compensation." Petition, pages 19 to 20. Petitioners further contend that the court below erroneously failed to consider this Court's opinion in the *First English Evangelical* case in rejecting petitioners' argument (Petition, page 20).

Respondents submit that petitioners' argument clearly does not justify issuance of a writ of *certiorari*. The opinion of the court below does not conflict with any decisions of this Court, including the *First English Evangelical* case. Several reasons support respondents' position.

First, as respondents set forth previously in this brief, the court below was entirely correct in ruling that the Act places no impediments upon the ability of the owner of a potential site to use his property. *See* page 8, *supra*. Once again, petitioners rely upon an invalid premise to support their claim.

Second, as respondents have also set forth, the periods of time petitioners cite are obviously the product of speculation. *See* page 10, *supra*. At this point no one – petitioners, respondents or the Court – can state with any certainty at all whether or not the Millstone potential site will be adopted at the end of the multi-step administrative review process and, even if it is adopted, whether condemnation proceedings will be necessary at that point. Petitioners' claim that the Act places them in a "uniquely negative position . . . for a period of at least 5 years" (Petition, page 19) is supportable only by hypothesis.

Third, the landowner is protected no matter what happens to the site. As the court below observed:

> There is no allegation that [petitioners] have lost their property or that they are threatened with losing their property. There is no evidence that if the hazardous-waste project does not go through, the permanent value of their property will nevertheless be diminished. They will be left in a fine position to develop their land. On the other hand, if it does go through, they will receive compensation for their property . . . . [*Littman v. Gimello, supra*, 115 *N.J.* at 166-167, 557 *A.*2d at 320 (Petitioners' Appendix A, page 13a)].

There is another possibility as well. If the site is adopted and more than one hazardous waste firm seeks to become the owner and operator of the facility, the value of the property could substantially rise, rather than fall, as the result of the competition between the firms for ownership of the site.

Even under petitioners' "worst case scenario" that condemnation will in fact occur *and* that compensation will be "based on a valuation already diminished by 5 years of the property's being submerged in a yellow cloud of fear, emotion and threatened condemnation" (Petition, page 20), the lower court's ruling of the Act's constitutionality is fully consistent with decisions of this Court. "[T]he valuation of property which has been taken must be calculated as of the time of the taking, and . . . depreciation in value of the property by reason of preliminary activity is not chargeable to the government." *First English Evan. Luth. Ch. v. Los Angeles Cty., supra*, 482 *U.S.* at 320, 107 *S.Ct.* at 2388, 96 *L.Ed.*2d at 267.

Accord, *Agins v. Tiburon*, 447 *U.S.* 255, 263 note 9, 100 *S.Ct.* 2138, 2143 note 9, 65 *L.Ed.*2d 106, 113 note 9 (1984).

Finally, petitioners' argument that the lower court erred by not considering this Court's decision in the *First English Evangelical* case as to the occurrence of a "taking" is totally untenable. That case is readily distinguishable. There, the issue was whether a temporary deprival of all use of property constituted a "taking" in the same way as a permanent deprival would. 482 *U.S.* at 318, 107 *S.Ct.* at 2388, 96 *L.Ed.*2d at 266. This Court stated, "We merely hold that where the government's activities *have already worked a taking of all use of property*, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 *U.S.* at 321, 107 *S.Ct.* at 2389, 96 *L.Ed.*2d at 268. (Emphasis added).

In this case, even assuming the truth of all of petitioners' factual allegations, clearly no "taking" has occurred. The prohibition on development present in the *First English Evangelical* case is not found in this case, and respondents' activities to date are only those of preliminary governmental decision-making. Petitioners cannot, therefore, fit this case into the "temporary takings" ruling of the *First English Evangelical* case. Their argument that the lower court erred by failing to consider that case is meritless.

## CONCLUSION

It is respectfully submitted that for the foregoing reasons the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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On the Brief

DATED: October 3, 1989

# APPENDIX – COVER TO DRAFT SITE EVALUATION REPORT TO NEW JERSEY HAZARDOUS WASTE FACILITIES SITING COMMISSION CONCERNING GAF PROPOSED INCINERATOR, LINDEN, NEW JERSEY.

NEW JERSEY HAZARDOUS WASTE
FACILITIES SITING COMMISSION

DRAFT
SITE EVALUATION REPORT
GAF PROPOSED INCENERATOR
LINDEN, N.J.

MARCH 1989

TAMS CONSULTANTS, INC.